U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

DATE: JUN 18 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: [redacted]

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exception Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center (Director). The approval was subsequently revoked. The petitioner filed an appeal, which is now before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner was a contracting business. It sought to permanently employ the beneficiary in the United States as a project architect pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

Section 203(b)(2) of the Act allows preference classification to be granted to qualified immigrants who are members of the professions holding advanced degrees or their equivalent, and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree ....

After initially approving the petition, the Director issued a Notice of Revocation on November 4, 2011. In that decision the Director determined that the evidence of record failed to establish:

(1) the petitioner's continuing ability to pay the proffered wage from the priority date (February 9, 2009) up to the present, in particular during the year 2009, and
(2) that the beneficiary had five years of experience as a project architect, as required on the labor certification.

The petitioner filed a timely appeal with documentary support.

On February 22, 2012, the AAO issued a Notice of Intent to Dismiss (NOID). The AAO cited records of the Secretary of State of Texas showing that the petitioner, [redacted] LLC ([redacted] formed on September 19, 2007), was terminated ("voluntarily dissolved") on August 7, 2009, which was before the petition was filed. The AAO advised that if the petitioner was not an active business, then no legitimate job offer would exist and the instant petition would be moot, or any approval thereof automatically revocable.[1] The petitioner was invited to submit additional evidence addressing the issue of the petitioner's dissolution. The AAO also requested

[1] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

specific documentation from the petitioner to establish its continuing ability to pay the proffered wage from the priority date up to the present and the beneficiary's work experience with a contracting company in Houston, Texas, from 2002 to 2008.

In response to the NOID counsel for the petitioner submitted a brief asserting that the record already contains sufficient evidence of the petitioner's continuing ability to pay the proffered wage and the beneficiary's six years of architectural experience with the contracting company in Houston, Texas. With regard to the petitioner's dissolution, counsel cites section 204(j) of the Act as applicable to the beneficiary and asserts that [redacted] – which counsel identifies as the petitioner's successor-in-interest – remains willing to employ the beneficiary as an architect under the terms and conditions of the petitioner's labor certification.

The procedural history of this case is documented by the record and incorporated into the decision. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). For the reasons discussed hereinafter, the appeal cannot be sustained.

Intent and Desire of the Petitioner to Employ the Beneficiary

As a threshold matter, the petition may not be approved because the petitioner is not a U.S. employer intending and desiring to employ the beneficiary. An "employer" is defined in part as a business entity having a federal employer identification number (FEIN) and a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ the beneficiary full-time in the United States. *See* 20 C.F.R. § 656.3. A U.S. employer must intend and desire to employ an alien when filing a Form I-140 seeking classification under section 203(b)(2) of the Act. *See* 8 C.F.R. § 204.5(c).

The petitioner in this proceeding is [redacted] which filed the Form I-140, Immigrant Petition for Alien Worker, on January 22, 2010. [redacted] FEIN is [redacted] is also the entity that filed the ETA Form 9089, Application for Permanent Labor Certification, on February 9, 2009. Midway between those two filings, however, in August 2009, [redacted] was dissolved. Thus, [redacted] had been out of existence for nearly half a year before the immigrant visa petition was filed in its name in January 2010.

Counsel contends that [redacted] (FEIN [redacted]) is [redacted] successor-in-interest. No documentary evidence was submitted to support this claim. Even if it had been, the fact remains that the immigrant visa petition was filed in the name of [redacted] not [redacted] At the time of filing in January 2010, [redacted] was no longer in existence. Therefore, it did not maintain a location to which U.S. workers could be referred for employment and it could not have had the intention and desire to employ the beneficiary.

Counsel asserts that section 204(j) of the Act – Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence – applies to the beneficiary in this case. Section 204(j) provides as follows:

> A petition under subsection (a)(1)(D)[2] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

This statutory provision is irrelevant to the appeal before the AAO. For whom and in what capacity the beneficiary has been working during the pendency of this petition has nothing to do with whether [redacted] is a valid petitioner in this proceeding.

Since [redacted] was not a U.S. employer desiring and intending to employ the beneficiary at the time the petition was filed, and is not today, the petition must be denied.

Petitioner's Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). As previously discussed, the priority date of this petition is February 9, 2009. The proffered wage of the project architect, as stated on the labor certification (and the petition), is $65,499 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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[2] Now subsection (a)(1)(F), as redesignated by Sec. 1503(d)(1), tit. V, div. B, Publ. L. No. 106-386, 114 Stat. 1464.

The evidence of record includes a copy of [redacted] 2008 federal income tax return (Form 1065, U.S. Return of Partnership Income). Since the priority is February 9, 2009, however, the 2008 tax return does not establish the petitioner's ability to pay the proffered wage at any time relevant to this petition.[3] The record also includes Form 1065s for the years 2009 and 2010, but they were filed by [redacted], not [redacted]. Therefore, they do not establish the petitioner's ability to pay the proffered wage in either of those years. In fact, [redacted] was only in existence for six months after the priority date, and there is no documentation in the record demonstrating its ability to pay the proffered wage during that period. Moreover, after its dissolution in August 2009 [redacted] did not have the ability to pay the proffered wage because it no longer existed as a business entity. Thus, the petitioner has failed to establish its ability to pay the proffered wage at any time from the priority date up to the present.[4] For this reason as well, the petition cannot be approved.

Conclusion

The petitioner – [redacted], [redacted] – has failed to establish that it is a U.S. employer intending and desiring to employ the beneficiary because it did not exist as a business entity at the time the petition was filed, or at any time since then. In addition, [redacted] has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present, among other reasons because it has not existed as a business entity since August 7, 2009. The petition will be denied on both of these grounds, with each considered as an independent and alternative ground for denial.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[3] Furthermore, the petitioner's 2008 tax return indicates that it is a "final return." Thus, it appears that the petitioner terminated its business months prior to its actual dissolution in August 2009.

[4] The AAO notes that the Director's Notice of Revocation was incorrect insofar as it found that the petitioner did establish its ability to pay the proffered wage in 2010.